STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE MELKUS and DIANE MELKUS d/b/a MELKUS MANAGEMENT COMPANY and CITY LIGHTS STAGE, INC.,

Plaintiffs-Appellants,

v

VISIONARY ACCESSORIES, INC., HARRY D. AKERS, STUDIO CONSULTING AND CONSTRUCTION, INC. and BARNES AND SWEENEY ENTERPRISES, INC.,

Defendants-Appellees,

and

ARDEX, INC., HOLLY CEMENT COMPANY, INC., SETCRAFTS, INC., MICHAEL D. KIKER, SR., JAMES P. CORLEY d/b/a SETCRAFTS AND SCENIC DESIGNS and DANA ROOFING AND CONSTRUCTION, INC.,

Defendants.

UNPUBLISHED
March 30, 1999

No. 202773
Oakland Circuit Court
LC No. 94-485395 CK

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiffs-appellants appeal as of right the trial court's orders granting summary disposition in favor of defendant-appellee Barnes & Sweeney Enterprises, Inc. ("Barnes & Sweeney") pursuant to MCR 2.116(C)(7), denying reconsideration of that order, denying plaintiffs' motion to amend the complaint and denying plaintiffs' motion to vacate and/or modify the judgment entered against defendants-appellees Visionary Accessories, Inc. ("Visionary"), Harry D. Akers ("Akers") and Studio Consulting and Construction, Inc. ("Studio"). We affirm.

I. Basic Facts And Procedural History

Plaintiffs contracted with Akers and Visionary as general contractors for improvements to a building to be used as a photographic studio and video sound stage. One aspect of the project was to level the studio floor using a self-leveling product manufactured by defendant Ardex, Inc. ("Ardex") and supplied by Barnes & Sweeney. The flooring product was poured by defendant Holly Cement Company in late October of 1988. Shortly thereafter, plaintiffs complained that the floor was too wavy for their purpose. Upon inspection, it was determined that too much water had been mixed with the product.

Pursuant to a November 8, 1988, agreement between plaintiffs, Visionary and Ardex, a second floor was poured in mid-November of 1988. According to the complaint, plaintiffs noticed deficiencies with the second floor the day after it was poured. Several unsuccessful attempts to correct the problems with the floor resulted in plaintiffs contracting with another flooring contractor who, in accordance with the Ardex product literature, applied an epoxy overlay. The epoxy overlay appeared to have cured the problems until, in July 1992, it was discovered that the Ardex floor beneath the epoxy was crumbling. Plaintiffs filed this action in mid-October of 1994.

Ardex filed a motion for summary disposition asserting the four-year statute of limitations contained in the Uniform Commercial Code, MCL 440.2725; MSA 19.2725. Barnes & Sweeney also moved for summary disposition claiming that plaintiffs' action was barred by the four-year limitations period. In response, plaintiffs claimed that the action was governed by the three-year limitations period for products liability claims, and that their action did not accrue until it was or should have been discovered. MCL 600.5805(9); MSA 27A.5805(9). The trial court held that plaintiffs' claim against Barnes & Sweeney was governed by the UCC's four-year statute of limitations and granted summary disposition under MCR 2.116(C)(7).

II. Standard Of Review

A. Statute Of Limitations

Where the facts are undisputed, "the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law, to be determined by the trial judge." *Berrios v Miles, Inc*, 226 Mich App 470, 473; 574 NW2d 677 (1997) (citations omitted). We review questions of law de novo on appeal. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Barnes & Sweeney raised this issue below in its motion for summary disposition, as did plaintiffs in their response and in their motion to amend. The issue is therefore preserved on appeal.

B. Mediation Award

"A motion for relief from judgment is directed to the trial court's discretion." *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 300; 517 NW2d 319 (1994); accord, *Lark v Detroit Edison Co*, 99 Mich App 280, 282; 297 NW2d 653 (1980). Plaintiffs raised this

issue in their motion to vacate the judgment. This Court has ruled that the mutual acceptance of a mediation award is analogous to a consent judgment and is not generally appealable. *Joan Automotive Industries, Inc v Check*, 214 Mich App 383, 389-390; 543 NW2d 15 (1995); *Espinoza v Thomas*, 189 Mich App 110, 117; 472 NW2d 16 (1991). However, a consent judgment may be set aside on a showing of fraud or mutual mistake. *Trendell v Solomon*, 178 Mich App 365, 367; 443 NW2d 509 (1989).

III. Statute Of Limitations

A. Introduction

A motion for summary disposition premised upon the statute of limitations is governed by MCR 2.116(C)(7). In deciding such a motion, the trial court must consider the pleadings, admissions, and other documentary evidence filed by the parties. MCR 2.116(G)(5).

Here, the trial court granted Barnes & Sweeney's motion for summary disposition by relying on MCL 440.2725; MSA 19.2725, Uniform Commercial Code § 2-725, which in pertinent part provides:

> (1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

The trial court ruled that the above-noted statute of limitations was the appropriate period since plaintiffs' claim against Barnes & Sweeney was based solely on the sale of commercial goods. Therefore, applying the economic loss doctrine, plaintiffs' exclusive remedy was under the UCC.

B. *Neibarger*

The Michigan Supreme Court has considered the applicability of the "economic loss doctrine," which bars tort recovery and limits remedies to those available under the Uniform Commercial Code, MCL 440.1101 *et seq.*; MSA 19.1101 *et seq.*, where a claim for damages arises out of the commercial sale of goods and losses incurred are purely economic. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 515; 486 NW2d 612 (1992). The Court ruled that, if the plaintiffs were limited by the doctrine to a warranty action governed by the UCC and its four-year statute of limitations, which recognizes no discovery rule, then their claims were time-barred. *Id.*, 515-516.

As with Barnes & Sweeney here, the defendants in *Neibarger* filed motions for summary disposition, arguing that because the plaintiffs' claim arose from the commercial sale of goods and they

sought only economic damages, their exclusive remedy was a breach of warranty action under Article 2 of the UCC. As with Barnes & Sweeney here, the *Neibarger* defendants further contended that such an action was barred by the UCC's four-year limitation period, which begins to run "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." MCL 440.2725(2); MSA 19.2725(2); *Neibarger, supra*, 439 Mich 517.

The *Neibarger* plaintiffs preferred the three-year statute of limitations set forth in the Revised Judicature Act, MCL 600.5805(9); MSA 27A.5805(9), arguing that it would not begin to run until the cause of action was discovered, or reasonably should have been discovered. *Neibarger, supra*, 439 Mich 517. Plaintiffs here also assert that their claim against Barnes & Sweeney is governed by the three-year statute and by "the six-year statute of limitation."[1]

The *Neibarger* Court addressed the question of whether the strict four-year limitation period of the UCC may be avoided by pleading claims sounding in tort. The Court held that, where the claims arise from a commercial transaction in goods and the plaintiff suffers only economic loss, the answer is "no." *Neibarger, supra*, 439 Mich 520. The Court noted the distinction between an individual consumer's tort remedy for products liability and an action brought by a party to a commercial transaction:

> [I]n a commercial transaction, the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers, and limitation of remedies. Where a product proves to be faulty after the parties have contracted for sale and the only losses are economic, the policy considerations supporting products liability in tort fail to serve the purpose of encouraging the design and production of safer products. [*Id.*, 523.]

The Court looked to decisions of this Court and the federal courts in reaching its determination that "where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations." *Id.*, 527-528. The Court followed this Court's lead in adopting the economic loss doctrine and the UCC as governing defective products claims in commercial matters. *Id.*, 528-529.

The Court also recognized that "there is support for the view that the UCC does not bar a tort claim where the plaintiffs are seeking to recover for property other than the product itself." *Id.*, 530. However, the Court stated that "failure of the product to perform as expected will necessarily cause damage to other property," but that such damage "should not preclude application of the economic loss doctrine where such property damage necessarily results from the delivery of a product of poor quality." *Id.*, 531. Finally, the Court noted that "the UCC provides remedies sufficient to compensate the buyer of a defective product for direct, incidental, and consequential losses, including property damage." *Id.*, 532, citing MCL 440.2714; MSA 19.2714 and MCL 440.2715; MSA 19.2715.

Here, the same issue is before this Court. A review of the pleadings and other evidence presented below reveals that plaintiffs sought only damages for commercial losses caused by the allegedly defective Ardex floor. These losses can be remedied only under the provisions of the UCC.

Neibarger, supra, 439 Mich 532. Moreover, Barnes & Sweeney only provided the material and was not involved in its application in any way. Thus, its involvement was solely a transaction of sale, covered by Article 2 of the UCC.

Plaintiffs argue that their claims against Barnes & Sweeney fall under an "exception" to the economic loss doctrine in that the floor allegedly posed a safety hazard.[2] Plaintiffs argue that the *Neibarger* Court "left open the prospect that the rule in [*Russell v Ford Motor Co*, 281 Or 587; 575 P2d 1383 (1978)] would apply in an appropriate case, as an expression of Michigan law." In *Russell*, the plaintiff recovered a judgment for damages to his pickup truck caused by a fracture of a defective weld in an axle housing. The *Russell* Court was faced with the question whether a manufacturer's strict liability for a dangerously defective product may be invoked when the only injury caused by the product is to the product itself. After reviewing the development of the law in Oregon distinguishing between tort law and commercial law, the *Russell* Court concluded that the law in Oregon recognized that, in order to recover on strict liability, "[t]he loss must be a consequence of the kind of danger and occur under the kind of circumstances, 'accidental' or not, that made the condition of the product a basis of strict liability." *Id.*, 595. The Court noted that "[t]his distinguishes such a loss from economic losses due only to poor performance or the reduced resale value of a defective, even a dangerously defective, product." *Id.*

However, we do not agree that the *Neibarger* Court left open the question of whether tort recovery for physical damage to the product itself caused by a defect that was a safety hazard would be allowed. The *Neibarger* Court simply noted that courts at one end of the spectrum have interpreted the economic loss doctrine as permitting such recovery. *Neibarger, supra*, 439 Mich 530. The Court then went on to agree with a federal district court that characterized physical injuries to a dairy herd as economic loss and denied tort recovery. *Id.*, 530-531, citing *Agristor Leasing v Spindler*, 656 F Supp 653 (D SD, 1987).

Moreover, the United States Supreme Court specifically rejected the *Russell* Court's approach in *East River Steamship Corp v Transamerica Delaval, Inc*, 476 US 858, 869-870; 106 S Ct 2295; 90 L Ed 2d 865 (1986). The Court adopted the majority position stated in cases holding that "preserving a proper role for the law of warranty precludes imposing tort liability if a product causes purely monetary harm." *Id.*, 868. The Court held that, where a defective product causes injury only to itself, a strict products liability theory of recovery is unavailable. *Id.*, 875. Thus, the plaintiffs were limited to their warranty claims and to the terms of their contract. Following *East River*, a six-year products liability statute of limitations would not apply to this action.

Since the *Neibarger* decision, the federal district court for the Western District of Michigan has addressed the scope of the economic loss doctrine. Applying Michigan law, the court found:

> Excepted from the "economic loss" are only those losses resultant from damage to other property caused by the defective product in a manner which was beyond the contractual contemplation of the parties. Considering the *Neibarger* court's concern with maintaining the integrity of the UCC, and of its purposes, it appears unlikely that the [Michigan] supreme court would expand this exception to permit recovery in tort for

> damage done to the product itself, even though such damage be inflicted in a manner beyond the parties' contemplation and even though other property was also damaged. [*Citizens Ins Co of America v Proctor & Schwartz, Inc*, 802 F Supp 133, 141 (WD Mich, 1992), aff'd 15 F3d 558 (CA 6, 1994).]

The federal district court found that the *Neibarger* decision was consistent with prior decisions of this Court. *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333; 480 NW2d 623 (1991); *Great American Ins Co v Paty's Inc*, 154 Mich App 634; 397 NW2d 853 (1986). Thus, the court ruled that, in Michigan, the economic loss doctrine barred recovery in tort for damage to the product and that the UCC provides the appropriate remedy for such losses arising out of commercial transactions. *Citizens, supra*, 802 F Supp 142. With the exception of the court's comments regarding tort recovery for other damages that "are not the sort of usual commercial losses that should naturally have been within the parties' contractual contemplation and that would therefore be remedial exclusively in contract," the Sixth Circuit adopted the reasoning of the court and affirmed its judgment. *Citizens Ins Co of America v Proctor & Schwartz, Inc*, 15 F3d 558 (CA 6, 1994).

Here, the gist of plaintiffs' complaint was that the Ardex flooring material proved inadequate for their purposes, thereby causing them loss which would have been compensable in a timely suit under the provisions of the UCC. *Id.*, 537. The flooring material was installed in October 1988 and again in November 1988. Plaintiffs did not file their complaint until October 1994. Because this litigation was not initiated within the four-year period provided by MCL 440.2725; MSA 19.2725, we hold that plaintiffs' action against Barnes & Sweeney was time-barred and that the trial court did not err by granting Barnes & Sweeney's motion for summary disposition based on the UCC's four-year statute of limitations. See also *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich App 40, 44-45; 585 NW2d 314 (1998).

C. Retroactivity

Plaintiffs argue that *Neibarger* should not be applied retrospectively because it "changes or modifies" the law articulated in *Southgate Community School Dist v West Side Constr Co*, 399 Mich 72; 247 NW2d 884 (1976), modified *Neibarger, supra*, 439 Mich 523-524, n 19. *Southgate* was a products liability action by which the plaintiff, not in privity of contract with the defendant manufacturer, sought to recover on an implied-warranty theory the cost of maintenance, repair and ultimate replacement of an allegedly defective product. There was no personal injury involved, nor was there any claim of damage for injury to property other than deterioration of the product itself. *Id.* This Court affirmed the trial court's dismissal on the grounds that the plaintiff's action was time-barred by the UCC's four-year period of limitations. MCL 440.2725; MSA 19.2725. *Id.*, 75-76. The Supreme Court reversed and ruled that the three-year statute governing actions "to recover damages for injuries to . . . property" applied to the case. *Id.*, 81 (citation omitted).

The *Southgate* case was decided before the United States Supreme Court's decision in *East River*, however, and did not address the Oregon court's ruling in *Russell*. Moreover, as noted by the *Neibarger* Court, the *Southgate* decision focused on privity.[3] To the extent that *Southgate* may be

read as rejecting the economic loss doctrine, it was modified by *Neibarger*. *Neibarger*, *supra*, 439 Mich 523-524, n 19.

Since the *Southgate* decision did not specifically reject the economic loss doctrine or reverse decisions of this Court that had already adopted the doctrine, however, we are not convinced that the trial court erred by applying *Neibarger* retroactively. "[T]he general rule is to give full retroactive effect to the decisions of Michigan appellate courts 'unless limited retroactivity is preferred where justified by the purpose of the new rule, the general reliance upon the old rule, and the effect of full retroactive application of the new rule on the administration of justice.'" *Jones v Powell*, 227 Mich App 662, 677; 577 NW2d 130 (1998), citing *Buckeye Marketers, Inc v Finishing Services, Inc*, 213 Mich App 615, 617-618; 540 NW2d 757 (1995), aff'd on other grounds 453 Mich 924 (1996).

D. Amendment Of Complaint

Plaintiffs also claim that the trial court erred by denying their motion for leave to amend the complaint. This Court reviews a grant or denial of a motion for leave to amend pleadings for abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997), citing *Horn v Dep't of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996).

"Amendment is generally a matter of right rather than grace." *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 456; 502 NW2d 696 (1992). A trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies in previously allowed amendments, undue prejudice to the opposing party, or where amendment would be futile. *Horn*, *supra*, 216 Mich App 65.

Here, at the hearing on plaintiffs' motion to amend the complaint, counsel stated, "What we want to amend to add is that the defect not only deteriorated the product itself but posed a risk of danger – an unreasonable risk of danger to human beings, personal injury – of that nature." Plaintiffs argued that by amending the complaint, it would change the statute of limitations and give them a longer period. However, since their is no "possible personal injury" exception to the economic loss rule, amendment to add such an assertion would have been futile. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). Consequently, we hold that the trial court did not err by denying plaintiffs' motion to amend the complaint to assert a nonexistent exception to the economic loss doctrine.

IV. Mediation Award

Plaintiffs challenge the trial court's order denying their motion to vacate and/or modify the judgment entered against Akers, Visionary and Studio on the parties' acceptance of the mediation award. Plaintiffs sought to vacate that award on the claim that defendants' counsel had misrepresented that the claim would be paid. Plaintiffs contend that that representation induced them to forego stating any objections to the mediation award or the proposed judgment on that award. However, we find that

plaintiffs have failed to present sufficient evidence of mistake, fraud, or unconscionable advantage which would justify vacating the judgment entered on the parties' acceptance of mediation. *Groulx v Carlson*, 176 Mich App 484, 492; 440 NW2d 644 (1989).

Plaintiffs' also claim that the mediation award against Akers, Visionary and Studio was defective because it did not state a separate award as to each defendant as required by MCR 2.403(K)(2). Under MCR 2.403(K)(2), a mediation evaluation must include a separate award as to a plaintiff's claim against each defendant in an action with multiple defendants. Defendants argue that the awards against Akers, Visionary and Studio were separate and were not "joint and several" as were the claims against the other defendants and, therefore, comported with the court rule. Plaintiffs have not refuted this claim. Moreover, the case relied upon by plaintiffs in support of their argument held that, where a corporation and its owner were sued jointly and severally, and the complaint did not make specific claims against either but, rather, referred to "defendants" generally, a single award that was not clearly rejected would be deemed accepted. *Dane Constr, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 291-292; 480 NW2d 343 (1991). We are therefore not persuaded that the mediation award was defective.

Finally, plaintiffs argue that they are entitled to interest on the judgment entered pursuant to the mediation award. A judgment entered as a result of a mediation award shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest, including prejudgment interest, to the date of entry of the judgment. *Mercer v Winnick*, 185 Mich App 567, 570; 462 NW2d 760 (1990). Therefore, plaintiffs' failure to reject the mediation award, or to object to entry of judgment based on that award, bars their claim for statutory interest.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[1] Plaintiffs fail to cite any statute or code identifying the source of the six-year limitation period.

[2] Plaintiffs' reply brief simply reiterates their position that, if "someone could be injured by the nature of the problem," then the economic loss doctrine should not apply.

[3] This Court has since ruled that the UCC applies to economic loss claims regardless of privity of contract between the parties. *Osmose Wood Preserving, supra*, 231 Mich App 44-45.